IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 00-15168-DD

D.C. Docket No. 98-02534-CV-C-W

TAMKO ROOFING PRODUCTS, INC., Plaintiff-Counter-defendant-Appellee,

versus

LOCAL 10711 UNITED STEELWORKERS OF AMERICA, Defendant-Counter-claimant-Appellant.

On Appeal from the United States District Court for the Northern District of Alabama

Before: CARNES and MARCUS, Circuit Judges, and PROPST*, District Judge.

(July 3, 2001)

* Honorable Robert P. Propst, U.S. District Judge for the Northern District of Alabama, sitting by designation.

PER CURIAM:

United Steelworkers of America ("Union") appeals the district court's grant of summary judgment in favor of Tamko Roofing Products, Inc., refusing to enforce an arbitral award. [R 12] The

award ordered that Bobby Campbell, a former employee of Tamko who was discharged for making a racially offensive comment to an employee of another company while Campbell was at work, be reinstated to his previous position with backpay. [R 12:8]

One of the exceptions to the rule that courts defer to the judgment of labor arbitrators, *see Paperworkers v. Misco, Inc.*, 484 U.S. 29, 36, 108, S. Ct. 364, 370 (1987), is the well-established principle that an arbitral award which is contrary to public policy is unenforceable, *see W.R. Grace & Co. v. Local Union 759*, 461 U.S. 757, 766, 103 S. Ct. 2177, 2183 (1983). In *Eastern Associated Coal Corp. v. United Mine Workers of America*, ___ U.S. ___, 121 S. Ct. 462 (2000, the Supreme Court explained:

> In considering this [public policy exception] claim . . . we must treat the arbitrator's award as if it represented an agreement between [the parties] as to the proper meaning of the contract[]. . . . [T]he question to be answered is . . . does the contractual agreement to reinstate [the grievant] with the specified conditions run contrary to an explicit, well-defined, and dominant policy, as ascertained by reference to positive law and not from general considerations of supposed public interest?

121 S. Ct. at 466-67 (citations omitted). We note that the *Eastern* decision was not available to the district court at the time it decided this case.

The district court refused to enforce the arbitral award because it determined that Campbell's work-related conduct violated the public policy that prohibits racial harassment in the workplace. [R 12: 15-17] However, as the Supreme Court explained in *Eastern*, "the question to be answered is not whether [the grievant's conduct] itself violates public policy, but whether the

agreement to reinstate him does so." *Id.* at 467; *see Grace*, at 766, 103 S. C. at 2183. Applying *Eastern*, the issue in this case is whether the arbitral award, which ordered that Campbell be reinstated to his previous position with backpay, is contrary to an explicit, well-defined, and dominant public policy. We hold that it is not.

Tamko contends that the award is contrary to the public policy in Title VII against racial harassment in the workplace. *See* 42 U.S.C. §§ 1981 & 2000e; *Newsday, Inc. v. Long Island Typo. Union*, 915 F.2d 840, 844 (2d Cir. 1990). According to Tamko, that public policy requires employers to voluntarily comply with Title VII by exercising reasonable care to prevent and correct promptly any harassing behavior. *See Faragher v. City of Boca Raton*, 524 U.S. 775, 807, 118 S. Ct. 2275, 2293 (1998); *Grace*, at 770-71, 103 S. Ct. at 2186; 29 C.F.R. § 1604(11)(d). [Red. Br. 22-26]

But nothing in the award is inconsistent with such a policy. The award simply orders Tamko to reinstate Campbell with backpay. It does not condone his harassing behavior, nor does the arbitral award itself preclude Tamko from imposing some form of discipline on Campbell other than discharge. Reinstating with backpay, i.e., not discharging, an employee who made the single racially insensitive remark that Campbell did does not violate any provision of Title VII, or of any other law, including decisional law, or any regulation. Therefore, we concluded that the award does not run contrary to an explicit, well-defined, and dominant public policy. *See Eastern*, 121 S. Ct. at 468-69 (award does not violate public policy because reinstatement with specified conditions "violates no specific provision of any law or regulation"); *Int'l Broth. of Elec. Workers v. Niagara Mohawk Power Corp.*, 196 F.3d 117, 131 (2d Cir. 1999) (upholding arbitral award to reinstate employee with back pay because no clear and unequivocal public policy precluded reinstatement); *Stead Motors*

v. Auto Machinists, 886 F.2d 1200, 1212 (9th Cir. 1989) (en banc) ("If a court relies on a public policy to vacate an arbitral award reinstating an employee, it must be a policy that bars reinstatement.") (emphasis in original).

Tamko may decide that Campbell's harassing conduct should not go unaddressed and, upon reinstating him, may chose to impose some form of discipline other than discharge (which is precluded by the arbitral award). If Campbell and the Union believe that a new discipline imposed by Tamko is inconsistent with the terms of the collective bargaining agreement, then he is free to file a grievance, and eventually pursue his claim to arbitration. We recognize that it is conceivable that the validity of the result in any future arbitration could end up in court, but it may not.[1] In any event, we express no opinion here as to the validity under the collective bargaining agreement, or under public policy, of any disciplinary action – short of discharge, which is precluded by the arbitral award – that Tamko may chose to take regarding Campbell.

Because the arbitral award in this case is not contrary to any explicit, well-defined, and dominant public policy, we uphold the arbitrator's decision to reinstate Campbell with back pay.[2]

REVERSED

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[1] We remind the parties that public policy does not prohibit them from working out amicably any remaining disagreements they may have.

[2] Tamko also contends that the award should be set aside because "it is arbitrary and capricious, is without any rational basis, and constitutes a dispensing of the arbitrator's own brand of industrial justice." [Red Br. 41-49] It is clear to us that contention lacks merit, because the arbitrator was "arguably construing" the Prevention of Harassment Policy, which was at best ambiguous. *See Misco*, at 36, 108 S. Ct. at 370.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
WESTERN DIVISION

TAMKO ROOFING PRODUCTS, INC.,

Plaintiff,

vs.

UNITED STEEL WORKERS OF AMERICA,
LOCAL 10711.

Defendant.

CIVIL ACTION NO. 98-C-2534-W

Filed Aug. 31, 2000

MEMORANDUM OPINION GRANTING THE PLAINTIFFS MOTION FOR SUMMARY JUDGMENT

In this case, the parties have filed cross-motions for summary judgment Plaintiff TAMKO Roofing Products, Inc. ("TAMKO") seeks to vacate an arbitrator's award, Defendant United Steelworkers of America, Local 1071L ("the Union") seeks to enforce it. Solely based on public policy considerations, the Court concludes that it should not be enforced.

I. The Undisputed Facts[1]

1. TAMCO is a manufacturer and distributor of commercial and residential roofing products. The Company owns and operates several manufacturing plants, including a plant in Tuscaloosa, Alabama. The Tuscaloosa plant employs approximately 180 hourly-paid production, maintenance, shipping and receiving employees represented by United Steelworkers of America, Local 1071L. About 25% of the work force employed at the Tuscaloosa plant is African-American.

2. Bobby Campbell, a white employee of TAMCO, was a lead man in the TAMCO's Tuscaloosa plant's Shipping Department. Campbell was discharged by the Company on October 30, 1997, for violating the Company's business conduct policy, which incorporates a prevention of workplace harassment. Campbell was a long service employee of the Company at the Tuscaloosa plant, having been first employed in 1979.

3. On October 27, 1997, at approximately 6:00A.M., Nathaniel Williams, an African-American employed by Cummings Truck Line as a truck spotter, was standing outside the Tuscaloosa plant's shipping office located in the vicinity of the plant's shipping dock.

4. Williams was assigned by his employer Cummings on a full-time daily basis to spot Cummings trailers at the TAMCO's Tuscaloosa plant's shipping dock. Williams had held this job assignment for about three years.

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[1] Mindful that "[t]he parties did not bargain for the facts to be found by a court, but by an arbitrator chosen by them" the court relies principally on the factual findings of the arbitrator, hereinafter referred to as the Arbitrator's Award ("AA"). *United Paperworkers Int'l Union v. Misco*, 484 U.S. 29, 108 S. Ct. 364 (1987)("*Misco*").

5. As a truck spotter, one of Williams' functions is to communicate to TAMCO Shipping Department personnel the trailer numbers of the Cummings trailers which Williams has spotted in TAMKO's truck bays and the order numbers for each of the Cummings trailers which Williams has spotted. Williams communicates such information periodically during the course of each work day to a TAMKO shipping lead man stationed in the shipping office.

6. On October 27, two Shipping Department lead men were employed at the Tuscaloosa plant, Campbell and Andy Miles, another white employee. At 6:00 A.M. on that day, both Campbell and Miles were seated inside the shipping office. Campbell was seated next to a sliding glass window which is opened by the lead man whenever a truck spotter, truck driver, or other person needs to communicate with the lead man inside the office Campbell's desk is at a right angle to the sliding glass window and the desk occupied by miles faces directly toward the sliding glass window. At 6:00 A.M. Williams was standing outside the shipping office waiting for Campbell to open the window so that Williams could communicate to Campbell the trailer numbers of the trailers he had spotted that morning and the order numbers for each trailer.

7. Campbell did not notice Williams standing outside waiting for Campbell to open the window. After Williams had been waiting for several minutes, Miles, who could see Williams through the office window, said to Campbell, "Nate's standing at the window." Campbell then opened the window and, according to his testimony, said to Williams: "Hey, man, I'm sorry, I didn't see you. There's not enough light. Maybe you need to paint your face white." Williams maintains that Campbell said, "You ought to paint your face white so I can see you better." Miles, the only other person who was present when Campbell opened the window and spoke to Williams, testified that Campbell's statement to Williams

was: "Man, you need to put some white shoe polish or something on your face. I didn't see you standing there."

8. Williams contends that Campbell's statement to him hurt him and caused him to be both distraught and angry. Williams was still "angry" when he talked to Miles a short time later. Miles told Williams that he had overheard Campbell's statement to Williams and suggested to Williams that he report the occurrence to a Shipping Department Supervisor, Ron Mitchell. Williams did so the same morning. Mitchell then interviewed both Williams and Campbell some time around 10:00 A.M. on that day and reported the occurrence to the Shipping Department Manager, Mike White, and to the Tuscaloosa plant General Manager, Tom Deloughery.

9. General Manager Deloughery, after receiving the report from White and Mitchell, conducted an investigation of the matter. Deloughery first interviewed Williams, and concluded that Campbell's statement to Williams had "embarrassed [Williams] and had made him feel bad and it hurt him."

10. Following his interview of Williams, Deloughery interviewed Campbell. Campbell admitted "No, I told him he should put white shoe polish on his face so I could see him better, but I didn't mean anything by it, I was only kidding."

11. Based upon his investigation of the occurrence, Deloughery determined that Campbell had made one of two statements to Williams on the morning of October 27. Campbell had either said to Williams, "You should paint your face white" or "You should put white shoe polish on your face." Deloughery concluded, that, whichever of the two statements Campbell had made to Williams, the statement was racially demeaning and offensive.

12. Less than two weeks before October 27, Campbell had attended a sensitivity training workshop conducted by TAMKO, focusing on racial and sexual harassment in the workplace. The

workshop, which was conducted on a department-by-department basis, was attended by all employees at the Tuscaloosa plant, including Bargaining Unit employees, non-unit employees, supervisors and managers. The Company conducted the workshop because of allegations of a racially hostile work environment at the Tuscaloosa plant which was asserted in a race discrimination lawsuit brought against the company by a former African-American employee. In September 1997, the Company's legal counsel had investigated the allegations and, as a result of that investigation, recommended sensitivity training be conducted at the Tuscaloosa plant regarding racial and sexual harassment.

13. Campbell, along with other Shipping Department employees, attended the sensitivity training workshop held on October 15, 1997. Miles also attended the workshop. The workshop was conducted by the plant's Human Resources Manager, Dwight Wood. Wood, among other things, told the workshop attendees, including Campbell, that racial jokes and racial comments at the plant would not be tolerated by the Company, and that TAMKO had "zero tolerance" for such conduct. Wood also told the workshop attendees, including Campbell, that "Tamko would not tolerate any type of racial comments or racial slurs and that any violation of this policy would be dealt with severely up to and including termination."

15. On October 29, Dougherty advised Campbell that he was suspended pending further investigation. Dougherty advised Campbell and the Union's Shop Steward that Campbell would likely be discharged.

16. The decision to discharge Campbell was made by Deloughery after consultation with the Company's Vice President of Manufacturing, Tom King, and the company's in-house attorney, Bob Bradley. Recognizing that Campbell was a long service employee and that he had no prior disciplinary record,

Deloughery, King and Bradley discussed and considered the possibility of imposing a lesser penalty than discharge for Campbell's conduct on October 27. All three concurred, however, that Campbell should be discharged. Deloughery explained the basis of the decision:

> "Several reasons, the first and foremost is the seriousness of the offense. We have a situation where Mr. Campbell directly confronted a black person and humiliated him based on his race, and in talking with Nate (Williams) I could see that he was hurt, he was upset, he wanted to know – he asked me what I have done to cause this. As far as I could see, he hadn't done anything to cause it. And he didn't understand why people would humiliate him like that and treat him like that, that is, why Bobby treated him like that. I felt it was a very serious offense. It had resulted in serious harm to a human being. Second reason is we had just finished the training. I mean training wasn't two weeks old and already we had a situation where somebody had disregarded the training that we had offered. And in the training we had told the people, we had put them on notice, this is not going to be tolerated. If you do it, you're going to be severely disciplined, and within two weeks it happened. And the third reason is I felt that if I didn't take strong actions that I would be undermining the policy that Tamko has, the fact that if I didn't do something very strong that I would be condoning that type of activity in the plant."

17. Deloughery notified Campbell on October 30, 1997, that he was discharged from the Company's employment. The Union grieved the discharge pursuant to the Grievance-Arbitration procedures of the Union Agreement. The grievance was denied by the Company and the Union.

18. The collective bargaining agreement between TAMKO and the Union provides, in relevant part,

> "Art. V, Sec. 5. Limitations on Power of the Arbitrator, Discharge and Disciplinary Cases. In discharge or discipline cases, the arbitrator's authority and function shall be limited to answering the following questions: (1) whether the conduct or actions of the grievant which led to the discharge or discipline did, in fact, occur and, if so (2) whether such conduct or actions by the grievant justified disciplinary action by the Company. If the arbitrator answers both of the foregoing questions in the affirmative, he shall deny the grievance and sustain the discharge or other discipline imposed by the Company. The arbitrator shall have no authority in discharge or disciplinary cases to substitute his judgment for that of the Company in respect to the appropriate degree of discipline."

19. Following the arbitration hearing, the Arbitrator sustained Campbell's grievance and ordered him reinstated, with backpay.

20. The arbitrator found that Campbell had not violated TAMKO's Workplace Harassment Policy, which provides in relevant part.

> "No employee of TAMKO should harass others, be they co-workers, subordinates or supervisors. Harassment can interfere with any employee's work, make the working environment offensive and destroy teamwork. It is TAMKO's policy that no form of harassment should be present in the workplace."

In reaching his conclusion, the Arbitrator reasoned that

> If the Company had wished to prohibit harassment not only of co-workers, subordinators or supervisors, it should have provided that its Prevention of Harassment Policy wold also

> apply to other individuals as employees of the Company's customers or as individuals who were on the Company's premises with the Company's permission. . . . It would not be equitable in this Arbitrator's opinion to stretch the wording which is the Company's wording in its Prevention of Harassment Policy to cover the harassment of people not co-workers, subordinates, or supervisors.

Arbitrator's Award, pp. 14-15. The basis of the Arbitrator's award was that the Company had charged Campbell with "an offensive which could only arise in harassment of a co-worker of [Campbell]." *Id.* at p. 16.

II. Applicable Legal Standards

Since the *Steelworkers Trilogy, United Steelworkers of America v. American Mfg. Co.*, 363 U.S. 564, 567, 80 S. Ct. 1343 (1960); *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 80 S. Ct. 1347; *United Steelworkers of America v. Enterprise Wheel & Car Co.*, 363 U.S. 593 (1960), the primacy of arbitration awards in the context of labor disputes has been settled:

> [t]he question of the interpretation of the collective bargaining agreement is a question for the arbitrator. It is the arbitrator's construction which was bargained for, and so far as the arbitrator's decision concerns construction of the contract, the courts have no business overruling him because their interpretation of the contract is different from his.

United Steelworkers of Am. v. Enterprise Wheel & Car Corp., 363 U.S. 593, 599, 80 S. Ct. 1358, 1362 (1960). Unless the award is merely the arbitrator's "own brand of industrial justice" or does not "dra[w] its essence form the collective bargaining agreement," a court is generally bound to enforce the award; it may

not second-guess the decision. *Id.*, at 597, 80 S. Ct. at 1361. It is irrelevant that the basis of the decision is ambiguous, that the arbitrator misread the contract, that the decision may appear to be incorrect, or that the decision is wrong. The courts generally "have no business weighing the merits" of the arbitration award. *Steelworkers v. American Mfg.*, 363 U.S. at 567-68, S. C. at 1346.

Eleventh Circuit jurisprudence requires that the party seeking to vacate an arbitration "refute every reasonable basis upon which the arbitrator may have acted." *Osram Sylvania, Inc. v. Teamsters Local Union*, 87 F.3d 1261, 1264 (11th Cir. 1996).

There is a narrow exception to the general judicial enforcibility of arbitration awards an arbitration award that contravenes public policy is unenforceable. *W. R. Grace & Co. v. Local Union 759, International Union of United Rubber*, 461 U.S. 757, 103, S. Ct. 2177 (1983), *Professional Administrators Ltd. v. Kopper-Glo Fuel, Inc.*, 819 F.2d 639, 643 (6th Cir. 1987). The Supreme Court has described the public policy doctrine as follows.

> A court's refusal to enforce an arbitrator's award under a collective-bargaining agreement because it is contrary to public policy is a specific application of the more general doctrine, rooted in the common law, that a court may refuse to enforce contracts that violate law or public policy. That doctrine derives from the basic notion that no court will lend its aid to one who founds a cause of action upon an immoral or illegal act, and is further justified by the observation that the public's interest in confining the scope of private agreements to which it is not a party will go unrepresented unless the judiciary takes account of those interests when it considers whether to enforce such agreement.

Misco, 484 U.S. at 42.[2] (citations omitted).

The issue of whether an award violates "public policy" is to be determined judicially. *Id.*, at 43 (citing *W.R. Grace*, 461 U.S. at 766, 103 S. Ct. at 2183, *Professional Administrators*, 819 F.2d at 644. But, a court may refuse to enforce and arbitral award only in limited situations where the award would violate some explicit, well-defined and dominant public policy. Public policy may not be discerned from "general consideration of supposed public interests," but rather by reference to specific laws and legal precedents. *Misco*, 484 U.S. at 43, 80 S. Ct. at 373, *citing W.R. Grace*, 461 U.S. at 766, 103 S. Ct. at 2183.

In the seminal case *Delta Air Lines Inc. v. Air Lines Pilots Assoc., Int'l.*, 861 F.2d 665 (11th Cir. 1988), the Eleventh Circuit enunciated the standard for determining whether the rare public policy exception will bar the judicial non-enforcement of an arbitration award. That case involved an arbitration award which reinstated a pilot discharged for having flown while drunk a passenger-filled Boeing-727 from Boston to Bangor, Maine.[3] The district court had refused to enforce the award on public policy grounds. Reversing the district court, the circuit held that the public

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[2] In Misco, the Supreme Court overturned the Fifth Circuit's declination to enforce an arbitration award reinstating a discharged employee who had violated the company's drug policy.

[3] A few months before the *Delta Airlines* case was decided, the circuit had dealt with a similar issue – one in which an arbitrator's award reinstated an employee in whose car cocaine and drug paraphernalia were found when he was arrested, off company time, for driving while intoxicated. The employee was discharged for violating the company's drug policy, albeit that the drug charges had been dismissed as part of a plea bargain. Relying on *Misco*, the circuit held that "the district court exceeded its limited authority to review arbitration awards," and reversed the district court's failure to enforce the award. *Florida Power Corp. v. International Broth. Of Elec. Wkrs.*, 847 F.2d 680 (11th Cir. 1988).

policy exception may be invoked only in the rare situation where the offending conduct arises from the performance of employment duties. The availability of the exception turns on whether the wrongdoer "is the employee qua employee." The court distinguished *Misco* and *Florida Power*.

> The employee in Misco appears to have smoked marijuana in a car in the plant's parking lot. The employee in Florida Power was discovered to have drug paraphernalia in his automobile. In these cases, the apparent wrongdoing was serious and is seriously condemned. However, in deciding to commit the wrong, the wrongdoer was not making an employment decision. The employer, on the other hand, may reasonably have disliked furnishing employment to one who is committing such wrongs. Yet, should the employer decide to continue to employ such a wrongdoer, even though his actions are condemned by public policy, that decision – to continue employment – is not itself contrary to public policy. Furthermore, the wrongdoing by an employee can be ended without affecting his employment. The wrongdoing and the employment are parallel but not intertwined. The wrongful conduct is wrongful, in and of itself, and its lawfulness vel non does not depend in any way on the employment. If public policy is offended – as it seems to have been – the performance of employment duties has nothing to do with it.

861 F.2d at 670-71. The relevant inquiry, explained the court, is this. "Does an established public policy condemn the performance of employment activities in the manner engaged in by the employee?"

The Eleventh Circuit's approach in *Delta Air Lines* has been rejected by two circuits, and followed by two others. The Ninth Circuit, *en banc*, concluded that

> the Eleventh Circuit's opinion in Delta is, to a large extent, simply inconsistent with the law was expressed in Grace and Misco. The Eleventh Circuit did not rely on the FAA's determination, alluding to it only in passing in a footnote, 861 F.2d at 668 n.3. Instead, the Delta court reasoned that, since what the pilot had done in flying drunk was illegal, the "performance of his employment [was] the very thing which offends public policy" and thus reinstatement was impermissible. 816 F.2d at 674. As we have explained, the critical inquiry is not whether the underlying act for which the employee was disciplined violates public policy, but whether there is a public policy barring reinstatement of an individual who has committed a wrongful act. [Citing *Grace* and *Misco*].

Stead Motors of Walnut Creek v. Automotive Machinists Lodge No. 1173, 886 F.2d 1200, 1215 (9th Cir. 1989). *Accord, Interstate Brands v. Chauffeurs, Teamsters, Local Union 135*, 909 F.2d 885 (6th Cir. 1990).

Two circuits have held outright that the prevention of sexual harassment is sufficient to invoke the public policy exception to the general rule that courts should not set aside arbitration awards which draw their essence from the contract. *In Newsday v. Long Island Typographical Union, No. 415, CWA, AFL-CIO*, 915 F.2d 840 (2nd Cir. 1990), a grievant had been reinstated by an arbitration award after having been discharged for sexually harassing female co-workers. The Second Circuit affirmed the district court vacatur of the arbitration award after reviewing the federal statutes and regulations, and case law, concluding that "there is an explicit, well-defined, and dominant public policy

against sexual harassment in the work place[,]" and that the arbitration award "prevents Newsday from carrying out its legal duty to eliminate sexual harassment in the work place." *Id.* at 845. The Third Circuit dealt with the same issue in *Stroehmann Bakeries, Inc. v. Local 776, Int'l Bro. of Teamsters*, 969 F.2d 1436 (3rd Cir. 1992), holding that an arbitrator's award reinstating an employee accused of sexual harassment without a determination on the merits of the allegation "violates well-established and dominant public policies concerning sexual harassment in the workplace." *Id.* at 1438. It reasoned

> [A]n award which fully reinstates an employee accused of sexual harassment without a determination that the harassment did not occur violates public policy. Therefore, [the arbitrator] construed the Agreement between the parties in a manner that conflicts with the well-defined and dominant policy concerning sexual harassment in the workplace and its prevention. His award would allow a person who may have committed sexual harassment to continue in the workplace without a determination of whether sexual harassment occurred. Certainly, it does not discourage sexual harassment. Instead, it undermines the employer's ability to fulfil its obligation to prevent and sanction sexual harassment in the workplace.

Id. at 1442.[4]

The Fourth and Tenth Circuits have held that the general public policy against sexual harassment is not sufficient to supplant labor

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[4] There was a vigorous dissent by Judge Becker, but he did not quarrel with the proposition that "a public policy against sexual harassment in the workplace can readily be derived from the federal statutes and regulations as well as from judicial decisions," and that "if the public policy against sexual harassment were offended by this arbitrator's decision, the award could not stand." *Id.* at 1450.

arbitration of employee disciplinary sanctions. *Communications Workers of Am. v. Southeastern Elec. Coop.*, 882 F.2d 467 (10th Cir. 1989), *Westvaco Corp. v. United Paperworkers Int'l Union*, 171 F.3d 971 (4th Cir. 1999).

In *Chrysler Motor Corp. v. International Union*, 959 F.2d 685 (7th Cir. 1992), the Seventh Circuit noted the "well-organized" public policy against sexual harassment in the workplace arising from federal statutes and case law. *Id.* at 687-88. But it declined to invoke the public policy exception to set aside the arbitrator's reinstatement award, deferring instead to the arbitrator's judgment that a 30-day suspension rather than discharge would be "adequate to deter [the grievant] from further misconduct and to demonstrate to all employees Chrysler's opposition to sexual harassment." *Id.* at 686.[5] Notably, the arbitrator possessed the contractual authority to determine what constitutes "good cause" for discharge.

Whatever the law in other circuits, this court is bound by the law of the Eleventh Circuit. And in this circuit, the public policy exception to the judicial enforcement of arbitration awards has two elements: 1) law and legal precedents establishing a well-defined and dominant public policy, and 2) violation of the public policy by an employee while performing his duties as an employee. Unless these elements are satisfied, the arbitral award must be enforced.

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[5] The *Chrysler* court noted *Delta Airlines* but distinguished it on the basis that the grievant was not performing the integral duties of his position as a forklift operator when he sexually assaulted his female co-worker. *Id.*, n.3 at p. 689.

III. Analysis

Racial harassment in the workplace violates 42 U.S.C. § 2000e (Title VII)'s ban prohibiting racial discrimination "against any individual with respect to his compensation, terms, conditions, or privileges of employment." 42 U.S.C. § 2000e-2(a)(1). The Equal Employment Opportunity Commission ("EEOC") has long recognized that harassment on the basis of race is an unlawful employment practice under Title VII. See 2 EEOC Compl. Man. § 615.7 (CCH). Harassment which is sufficiently severe or pervasive to alter the terms and conditions of an employee's employment and create an abusive working environment is generally condemned by Title VII. *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 65-66, 106 S. Ct. 2399, 2404-05 (1986). Our circuit has repeatedly held that an employer violates Title VII "simply by creating or condoning an environment at the workplace which significantly and adversely affects (the psychological well-being of) an employee because of his race or ethnicity." *Walker v. Ford Motor Co.*, 684 F.2d 1355, 1358 (11th Cir. 1982), (citing *Henson v. City of Dundee*, 682 F.2d 897, 901 (11th Cir. 1982). *See also, Rogers v. EEOC*, 454 F.2d 234, 238 (5th Cir. 1981).

Moreover, 42 U.S.C. § 1981, whose roots have grown and developed over the last one and a third century, and particularly in the last nine years, establishes a dominant national policy forbidding racial discrimination and harassment in the workplace. In *Patterson v. McLean Credit Union*, 491 U.S. 164, 109 S. Ct. 2363 (1989), a bitterly divided Supreme Court held that this venerable statute 42 U.S.C. did not cover racial harassment in the workplace. Two years later, the Congress overturned this niggard interpretation of § 1981 by enactment of The Civil Rights Restoration Act of 1991, which makes it clear that the statute cover "the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship". 42 U.S.C. § 1981(b).

Certainly, freedom from a racially hostile work environment is a "benefit, term, and condition" of the employment relationship.

And the national policy is binding on unions as well as employees. *See Goodman v. Lukens Steel Co.*, 482 U.S. 656 (1987), (union violated both Section 1981 and Title VII where it chooses not to process racial grievance under the equal employment clause of the union contract with the aim of enhancing its probabilities of success on other issues), *Terrell v. U.S. Pipe & Foundry Co.*, 644 F.2d 1112, 1120 (5th Cir. Unit B 1981), *vacated on other grounds*, 456 U.S. 955 (1982), *Howard v. Int'l Moulders & Allied Wrkrs. Union, Local 100*, 779 F.2d 1546 (11th Cir. 1986); (unions have an affirmative duty to eliminate any form of racial discrimination).

Equally clear is that Bobby Campbell violated this public policy while performing his duties as an employee of TAMKO. It was in specific reference to Campbell and Williams' performance of their respective duties that Campbell made the racially offensive statement.

Based on these considerations, the arbitrator's award should not be enforced by this court.

By separate order TAMKO's motion for Summary Judgment will be granted The Union motion will be denied.

DONE this 31st day of August, 2000.

/s/
UNITED STATES DISTRICT
JUDGE U.W. CLEMON

29 U.S.C. § 185

UNITED STATES CODE
TITLE 29. LABOR
CHAPTER 7--LABOR-MANAGEMENT RELATIONS
SUBCHAPTER IV--LIABILITIES OF AND RESTRICTIONS ON LABOR AND MANAGEMENT

§ 185. Suits by and against labor organizations

(a) Venue, amount, and citizenship

Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

(b) Responsibility for acts of agent; entity for purposes of suit; enforcement of money judgments

Any labor organization which represents employees in an industry affecting commerce as defined in this chapter and any employer whose activities affect commerce as defined in this chapter shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. Any money judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets.

(c) Jurisdiction

For the purposes of actions and proceedings by or against labor organizations in the district courts of the United States, district

courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in representing or acting for employee members.

(d) Service of process

The service of summons, subpoena, or other legal process of any court of the United States upon an officer or agent of a labor organization, in his capacity as such, shall constitute service upon the labor organization.

(e) Determination of question of agency

For the purposes of this section, in determining whether any person is acting as an "agent" of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.

42 U.S.C. § 1981

UNITED STATES CODE ANNOTATED
TITLE 42. THE PUBLIC HEALTH AND WELFARE
CHAPTER 21--CIVIL RIGHTS
SUBCHAPTER I--GENERALLY

§ 1981. Equal rights under the law

(a) Statement of equal rights

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

(b) "Make and enforce contracts" defined

For purposes of this section, the term "make and enforce contracts" includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.

(c) Protection against impairment

The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law.

42 U.S.C. § 2000e-2

UNITED STATES CODE ANNOTATED
TITLE 42. THE PUBLIC HEALTH AND WELFARE
CHAPTER 21--CIVIL RIGHTS
SUBCHAPTER VI--EQUAL EMPLOYMENT OPPORTUNITIES

§ 2000e-2. Unlawful employment practices

(a) Employer practices

It shall be an unlawful employment practice for an employer--

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

(b) Employment agency practices

It shall be an unlawful employment practice for an employment agency to fail or refuse to refer for employment, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin, or to classify or refer for employment any individual on the basis of his race, color, religion, sex, or national origin.

(c) Labor organization practices

It shall be an unlawful employment practice for a labor organization--

(1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin;

(2) to limit, segregate, or classify its membership or applicants for membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's race, color, religion, sex, or national origin; or

(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

(d) Training programs

It shall be an unlawful employment practice for any employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs to discriminate against any individual because of his race, color, religion, sex, or national origin in admission to, or employment in, any program established to provide apprenticeship or other training.

(e) Businesses or enterprises with personnel qualified on basis of religion, sex, or national origin; educational institutions with personnel of particular religion

Notwithstanding any other provision of this subchapter, (1) it shall not be an unlawful employment practice for an employer to hire and employ employees, for an employment agency to classify,

or refer for employment any individual, for a labor organization to classify its membership or to classify or refer for employment any individual, or for an employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining programs to admit or employ any individual in any such program, on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise, and (2) it shall not be an unlawful employment practice for a school, college, university, or other educational institution or institution of learning to hire and employ employees of a particular religion if such school, college, university, or other educational institution or institution of learning is, in whole or in substantial part, owned, supported, controlled, or managed by a particular religion or by a particular religious corporation, association, or society, or if the curriculum of such school, college, university, or other educational institution or institution of learning is directed toward the propagation of a particular religion.

(f) Members of Communist Party or Communist-action or Communist-front organizations

As used in this subchapter, the phrase "unlawful employment practice" shall not be deemed to include any action or measure taken by an employer, labor organization, joint labor-management committee, or employment agency with respect to an individual who is a member of the Communist Party of the United States or of any other organization required to register as a Communist-action or Communist-front organization by final order of the Subversive Activities Control Board pursuant to the Subversive Activities Control Act of 1950 [50 U.S.C.A. § 781 et seq.].

(g) National security

Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to fail or refuse to hire and employ any individual for any position, for an employer to discharge any individual from any position, or for an employment agency to fail or refuse to refer any individual for employment in any position, or for a labor organization to fail or refuse to refer any individual for employment in any position, if--

(1) the occupancy of such position, or access to the premises in or upon which any part of the duties of such position is performed or is to be performed, is subject to any requirement imposed in the interest of the national security of the United States under any security program in effect pursuant to or administered under any statute of the United States or any Executive order of the President; and

(2) such individual has not fulfilled or has ceased to fulfill that requirement.

(h) Seniority or merit system; quantity or quality of production; ability tests; compensation based on sex and authorized by minimum wage provisions

Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin, nor shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its

administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin. It shall not be an unlawful employment practice under this subchapter for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of section 206(d) of Title 29.

(i) Businesses or enterprises extending preferential treatment to Indians

Nothing contained in this subchapter shall apply to any business or enterprise on or near an Indian reservation with respect to any publicly announced employment practice of such business or enterprise under which a preferential treatment is given to any individual because he is an Indian living on or near a reservation.

(j) Preferential treatment not to be granted on account of existing number or percentage imbalance

Nothing contained in this subchapter shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this subchapter to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employer, referred or classified for employment by any employment agency or labor organization, admitted to membership or classified by any labor organization, or admitted to, or employed in, any apprenticeship or other training program, in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or

other area, or in the available work force in any community, State, section, or other area.

(k) Burden of proof in disparate impact cases

(1)(A) An unlawful employment practice based on disparate impact is established under this subchapter only if--

(i) a complaining party demonstrates that a respondent uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin and the respondent fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity; or

(ii) the complaining party makes the demonstration described in subparagraph (C) with respect to an alternative employment practice and the respondent refuses to adopt such alternative employment practice.

(B)(i) With respect to demonstrating that a particular employment practice causes a disparate impact as described in subparagraph (A)(i), the complaining party shall demonstrate that each particular challenged employment practice causes a disparate impact, except that if the complaining party can demonstrate to the court that the elements of a respondent's decisionmaking process are not capable of separation for analysis, the decisionmaking process may be analyzed as one employment practice.

(ii) If the respondent demonstrates that a specific employment practice does not cause the disparate impact, the respondent shall not be required to demonstrate that such practice is required by business necessity.

(C) The demonstration referred to by subparagraph (A)(ii) shall be in accordance with the law as it existed on June 4, 1989, with respect to the concept of "alternative employment practice".

(2) A demonstration that an employment practice is required by business necessity may not be used as a defense against a claim of intentional discrimination under this subchapter.

(3) Notwithstanding any other provision of this subchapter, a rule barring the employment of an individual who currently and knowingly uses or possesses a controlled substance, as defined in schedules I and II of section 102(6) of the Controlled Substances Act (21 U.S.C. 802(6)), other than the use or possession of a drug taken under the supervision of a licensed health care professional, or any other use or possession authorized by the Controlled Substances Act [21 U.S.C.A. § 801 et seq.] or any other provision of Federal law, shall be considered an unlawful employment practice under this subchapter only if such rule is adopted or applied with an intent to discriminate because of race, color, religion, sex, or national origin.

(l) Prohibition of discriminatory use of test scores

It shall be an unlawful employment practice for a respondent, in connection with the selection or referral of applicants or candidates for employment or promotion, to adjust the scores of, use different cutoff scores for, or otherwise alter the results of, employment related tests on the basis of race, color, religion, sex, or national origin.

(m) Impermissible consideration of race, color, religion, sex, or national origin in employment practices

Except as otherwise provided in this subchapter, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was

a motivating factor for any employment practice, even though other factors also motivated the practice.

(n) Resolution of challenges to employment practices implementing litigated or consent judgments or orders

(1)(A) Notwithstanding any other provision of law, and except as provided in paragraph (2), an employment practice that implements and is within the scope of a litigated or consent judgment or order that resolves a claim of employment discrimination under the Constitution or Federal civil rights laws may not be challenged under the circumstances described in subparagraph (B).

(B) A practice described in subparagraph (A) may not be challenged in a claim under the Constitution or Federal civil rights laws--

(i) by a person who, prior to the entry of the judgment or order described in subparagraph (A), had--

(I) actual notice of the proposed judgment or order sufficient to apprise such person that such judgment or order might adversely affect the interests and legal rights of such person and that an opportunity was available to present objections to such judgment or order by a future date certain; and

(II) a reasonable opportunity to present objections to such judgment or order; or

(ii) by a person whose interests were adequately represented by another person who had previously challenged the judgment or order on the same legal grounds and with a similar factual situation, unless there has been an intervening change in law or fact.

(2) Nothing in this subsection shall be construed to--

(A) alter the standards for intervention under rule 24 of the Federal Rules of Civil Procedure or apply to the rights of parties who have successfully intervened pursuant to such rule in the proceeding in which the parties intervened;

(B) apply to the rights of parties to the action in which a litigated or consent judgment or order was entered, or of members of a class represented or sought to be represented in such action, or of members of a group on whose behalf relief was sought in such action by the Federal Government;

(C) prevent challenges to a litigated or consent judgment or order on the ground that such judgment or order was obtained through collusion or fraud, or is transparently invalid or was entered by a court lacking subject matter jurisdiction; or

(D) authorize or permit the denial to any person of the due process of law required by the Constitution.

(3) Any action not precluded under this subsection that challenges an employment consent judgment or order described in paragraph (1) shall be brought in the court, and if possible before the judge, that entered such judgment or order. Nothing in this subsection shall preclude a transfer of such action pursuant to section 1404 of Title 28.

IN THE MATTER OF THE ARBITRATION BETWEEN

TAMKO ROOFING PRODUCTS, INC.,	) GRIEVANT: Bobby Campbell
AND	)
UNITED STEEL-WORKERS OF AMERICA, LOCAL 1071L	) PLACE: TUSCALOOSA, AL) DATE: 7/23/98

****

BEFORE: J. REESE JOHNSTON, JR.,

APPEARANCES: FOR THE COMPANY:

Allan L. Bioff
J. Randall Coffey
Bioff, Singer & Finucane
104 West 9th Street
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FOR THE UNION:
Billy McColeman
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Fairfield, AL 35064

POST-HEARING
BRIEFS RECEIVED: August 29, 1998

BACKGROUND

Tamko Roofing Products, Inc., is a manufacturer and distributor of commercial and residential roofing products. The Company owns and operates several manufacturing plants, including a plant in Tuscaloosa, Alabama. The Tuscaloosa plant employs approximately 180 hourly-paid production, maintenance, shipping and receiving employees represented by United Steelworkers of America, Local 1071L. About 25% of the work force employed at the Tuscaloosa plant is African-American.

Bobby Campbell, the Grievant, was a lead man in the Tuscaloosa plant's Shipping Department, and was discharged by the Company on October 30, 1997, for violating the Company's business conduct policy, which incorporates a prevention of workplace harassment.. Grievant was a long service employee of the Company at the Tuscaloosa plant, having been first employed in 1979.

On October 27, 1997. at approximately 6:00 a.m., a truck spotter named Nathaniel Williams, who is employed by Cummings Truck Line, was standing outside the Tuscaloosa plants shipping office located in the vicinity of the plant's shipping dock.

Williams was assigned by his employer Cummings on a full-time, daily basis to spot Cummings trailers at the Tamko Tuscaloosa plant's shipping dock. Williams had held this job assignment for about three years. Williams is an African- American.

As a truck spotter, one of Williams' functions is to communicate to Tamko Shipping Department personnel the trailer numbers of the Cummings trailers which Williams has spotted in Tamko's truck bays and the order numbers for each of the Cummings trailers which Williams has spotted. Williams communicates such information periodically during the course of each work day to a Tamko shipping lead man stationed in the shipping office.

On October 27 two Shipping Department lead men were employed at the Tuscaloosa plant, the Grievant and Andy Miles both non-minorities. At 6:00 a.m. on October 27, both Grievant and Miles were seated inside the shipping office. Grievant was seated next to a sliding glass window which is opened by the lead man whenever a truck spotter, truck driver, or other person needs to communicate with the lead man inside the office. The Grievant's desk is at a right angle to the sliding glass window and the desk occupied by Miles faces directly toward the sliding glass window. At 6:00 a.m. Williams was standing outside the shipping office waiting for Grievant to open the window so that Williams could communicate to the Grievant the trailer numbers of the trailers he had spotted that morning and the order numbers for each trailer.

Grievant did not notice Williams standing outside waiting for Grievant to open the window. After Williams had been waiting several minutes, Miles, who could see Williams through the office window, said to the Grievant, "Nate's standing at the window." Grievant then opened the window and, according to his testimony, said to Williams: "Hey, man, I'm sorry, I didn't see you. There's not enough light. Maybe you need to paint your face white." Williams in his testimony testified that the Grievant said "You ought to paint your face white so I can see you better." Miles, the only other person who was present when Grievant opened the window and spoke to Williams. testified that Grievant's statement to Williams was: "Man, you need to put some white shoe polish or something on your face. I didn't see you standing there."

Williams alleged that the Grievant's statement to him hurt him and caused him to be both distraught and angry. Williams was still "angry" when he talked to Miles a short time later. Miles told Williams that he had overheard Grievant's statement to Williams and suggested to Williams that he report the occurrence to a Shipping Department Supervisor, Ron Mitchell. Williams did so the same morning. Mitchell then interviewed both Williams and the

Grievant some time around 10:00 a.m. on that day and reported the occurrence to the Shipping Department Manager, Mike White, and to the Tuscaloosa plant General Manager, Tom Deloughery.

General Manager Deloughery, after receiving the report from Department Manager White and Supervisor Mitchell, that Grievant had made a racially offensive statement to Williams. Deloughery conducted an investigation of the matter. Deloughery first interviewed Williams. This interview was conducted at about 10:30 a.m. on October 27. Deloughery asked Williams what had occurred early that morning with regard to the Grievant, Bobby Campbell. Williams responded that "Bobby Campbell hadn't seen him and that when Bobby opened the window Bobby said 'you should paint your face white so I can see you better.'" During the interview Deloughery observed that Williams was "very upset", and "agitated" by the statement that Grievant had made to him that morning. Deloughery concluded that Grievant's statement to Williams had "embarrassed him and had made him feel bad and it hurt him."

Following his interview of Williams, Deloughery interviewed Grievant that same morning. Deloughery told Grievant that Williams had reported to him that "you said to him that he should paint his face white so you could see hun better." Grievant responded, "No, I told him he should put white shoe polish on his face so I could see him better, but I didn't mean anything by it, I was only kidding."

Based upon his investigation of the occurrence, including his interview with Williams and Grievant, Deloughery determined that Grievant had made one of two statements to Williams on the morning of October 27. Grievant had either said to Williams, "You should paint your face white" or "You should put white shoe polish on your face". Deloughery concluded that, whichever of the two

statements Grievant had made to Williams. the statement was racially demeaning and offensive.

The next morning, October 28, Deloughery, in the presence of the Union Shop Steward, advised Grievant that he was suspended pending further investigation. Deloughery further advised Grievant and the Shop Steward that it was very probable that Grievant's employment with the Company would be terminated.

Less than two weeks before the date October 27 that Grievant made the racially derogatory remark to Williams, Grievant had attended a sensitivity training workshop conducted by the Company, focusing on racial and sexual harassment in the workplace. The workshop, which was conducted on a department-by-department basis, was attended by all employees at the Tuscaloosa plant, including Bargaining Unit employees, non-unit employees, supervisors and managers. The Company conducted the workshop because of allegations of a racially hostile work environment at the Tuscaloosa plant which was asserted in a race discrimination lawsuit brought against the Company by a former African-American employee. In September 1997 the Company's legal counsel had investigated the allegations and, as a result of that investigation, recommended that sensitivity training be conducted at the Tuscaloosa plant regarding racial and sexual harassment.

Grievant, along with other Shipping Department employees, attended the sensitivity training workshop held on October 15, 1997. Fellow lead man Miles also attended the same workshop. Each of the department workshops, including the one attended by Grievant and Miles, was conducted by the plant's Human Resource Manager, Dwight Wood. Wood, among other things, told the workshop attendees, including Grievant, that racial jokes and racial comments at the plant would not be tolerated by the Company, and that Tamko had "zero tolerance" for such conduct.

Wood also told the workshop attendees, including Grievant, that "Tamko would not tolerate any type of racial comments or racial slurs and that any violation of this policy would be dealt with severely up to and including termination".

The decision to discharge the Grievant was made by General Manager Deloughery after consultation with the Company's Vice President of Manufacturing, Tom King, and the Company's in-house attorney, Bob Bradley. Recognizing that Grievant was a long service employee and that he had no prior disciplinary record, Deloughery, King and Bradley discussed and considered the possibility of imposing a lesser penalty than discharge for Grievant's conduct on October 27. All three concurred, however, that Grievant should be discharged. Deloughery testified why he, King and Bradley arrived at that decision;

> "Several reasons, the first and foremost is the seriousness of the offense. We have a situation where Mr. Campbell directly confronted a black person and humiliated him based on his race, and in talking with Nate.(Williams) I could see that he was hurt, he was upset, he wanted to know — he asked me what I have done to cause this. As far as I could see, he hadn't done anything to cause it. And he didn't understand why people would humiliate him like that and treat him like that, that is, why Bobby treated him like that. I felt it was a very serious offense. It had resulted in serious harm to a human being."
>
> Second reason is we had just finished the training. I mean training wasn't two weeks old and already we had a situation where somebody had disregarded the training that we had offered. And in the training we had told the people, we had put them on notice, this is not going to be tolerated. If you do it, you're going to be severely disciplined, and within two weeks it happened. And the third reason is I felt that if I didn't take strong actions that I would be undermining the policy that

Tamko has, the fact that if I didn't do something very strong that I would be condoning that type of activity in the plant."

Deloughery notified the Grievant on October 30, 1997, that he was discharged from the Company's employment. The Union grieved the discharge pursuant to the Grievance-Arbitration procedures of the Union Agreement. The grievance was denied by the Company, was appealed by the Union to arbitration and is now before this Arbitrator for final solution.

APPLICABLE CONTRACT PROVISIONS

"ARTICLE VI
DISCHARGE AND SUSPENSION

"Employees shall not be discharged or suspended without just cause. The discharge or suspension shall be considered final unless the discharge or suspension is protested in writing to the General Manager within three working days after the discharge or suspension becomes effective. If so protested, the written protest will be deemed to be a grievance under the grievance-arbitration provisions of this Agreement provided, however, that such grievance will be taken up directly in the second step of the grievance procedure and the first step of the grievance procedure will automatically be deemed waived by the parties. Should the grievance be taken to arbitration, the limitations contained in Article V, Section 5 ('Limitations on Powers of the Arbitrator; Discharge and Disciplinary Cases') shall be applicable.

Should it be determined in the grievance-arbitration procedure that an employee discharged or suspended is entitled to back pay, any such back pay award shall be reduced by the amount of unemployment compensation benefits or compensation for personal services which the employee may have received during the period of separation (other than compensation for personal

services received by the discharged or suspended employee from a second job which the discharged or suspended employee held and was compensated for, for a period of not less than thirty days immediately prior to the beginning of his separation from the Company). Federal, state or local taxes, or dues and insurance premiums normally deducted from the employee's pay shall be withheld from any back pay award.

An employee suspended by the Company pending investigation to determine if discharge or other disciplinary action is justified, shall be notified by the Company not later than ten (10) calendar days following the first day of such suspension as to the conduct or actions of the employee which are under investigation. Failure to so notify the suspended employee shall not affect the Company's right to discharge or discipline the suspended employee for just cause.

An employee will be told when a written counseling report is to be placed in his personnel file and, upon the employee's request, will be provided a copy of the written counseling report.

When an employee is suspended or discharged, the Company will notify the Union of such action. Failure to give or delay in giving such notice shall not affect the propriety of the suspension or discharge."

"Art. V, Sec. 5. Limitations on Power of the Arbitrator; Discharge and Disciplinary Cases. In discharge or discipline cases, the arbitrator's authority and function shall be limited to answering the following questions: (1) whether the conduct or actions of the grievant which led to the discharge or discipline did, in fact, occur and, if so (2) whether such conduct or actions by the grievant justified disciplinary action by the Company. If the arbitrator answers both of the foregoing questions in the affirmative, he shall deny the grievance and sustain the discharge

or other discipline imposed by the Company. The arbitrator shall have no authority in discharge or disciplinary cases to substitute his judgment for that of the Company in respect to the appropriate degree of discipline.

Attached hereto and marked Exhibit "A" is the prevention of Harassment Policy of Tamko Roofing Products, Inc. This policy was amended as of January 1, 1997.

ISSUE

Did the Company have just cause to discharge the Grievant, Bobby Campbell? If not, what should the remedy be?

POSITION OF THE PARTIES

It is the position of the Company:

A. The conduct which led to the Grievant's discharge did in fact occur.

B. 1. Grievant's statement to Williams was racially offensive and violates the Company's policies, which prohibit all forms of workplace harassment, including the use of racially demeaning or offensive language.

2. All Tuscaloosa plant employees, including Grievant, were placed on clear notice shortly before Grievant's racial statement (i) that the Company would not tolerate the use of racially demeaning or offensive language in violation of the Company's policies prohibiting all forms of workplace harassment, including racial harassment; (ii) that violations of those policies would subject the violator to severe discipline.

3. The Company has an absolute legal obligation under Title VII of the Civil Rights Act of 1964 to prevent the use of racially demeaning or offensive language in the workplace and to prohibit a racially offensive work environment.

4. Court decisions and arbitral authority establish that Grievant's use of racially demeaning or offensive language in the workplace provides just cause for disciplining even though directed at a non-employee because such language pollutes the working environment of other employees in violation of Title VII.

5. Prior to the hearing, the Union conceded that Grievant's conduct justified disciplinary action by the Company.

C. 1. The Company and the Union have contractually agreed that the Arbitrator has no authority to modify the discharge penalty imposed by the Company.

2. The Union's contention that the Arbitrator has authority to modify the discharge penalty ignores the clear and unambiguous language of the Labor Agreement and seeks to obtain an arbitration that the Union was unable to obtain in Collective Bargaining.

3. The Arbitrator would not be warranted in modifying the discharge even in the absence of the limitations on his authority imposed by the contract in this case.

It is the Union's position:

1. That the alleged racial remark was nothing more than shop talk and as Campbell, the Grievant, stated, "I didn't mean anything by it. The Grievant and Williams had been friends for years.

2. That the contract provides that the Company has to have just cause to discharge an employee.

3. That the fact that Mr. Williams was not an employee of the Company and not being a Company employee, the policy of the Company would, under the law of Contracts, not have application in this case since Mr. Williams was in fact not a co-employee subordinate or superior to the Grievant, Bobby Campbell.

DISCUSSION

I have reviewed the transcript of the testimony of the witnesses, examined carefully the exhibits introduced into evidence by the parties, and I have read and studied the excellent post-hearing briefs filed by the representatives of the parties. I have also read and studied the 14 Federal Court cases and the 16 arbitral cases cited in support of said briefs. These post-hearing briefs were received on August 29, 1998.

A careful reading of the Company's Prevention of Harassment Policy shows that policy by its own specific terms prohibits harassment only to co-workers, subordinate or superior. It is conceded that Mr. Williams, the person allegedly harassed, was not an employee of the Company, but was in fact an employee of Cummings Truck Lines.

The Company promulgated its Prevention of Harassment Policy unilaterally. This Policy states in its introduction paragraph: "No employee of Tamko should harass others, be they co-workers, subordinates or supervisors." If the Company had wished to prohibit harassment not only of co-workers, subordinates or supervisors, it should have provided that its Prevention of Harassment Policy would also apply to other individuals as employees of the Company's customers or as individuals who were on the Company premises with the Company's permission. This the Company in adopting and amending its Business Policy and Prevention of Harassment Policy did not do.

It would not be equitable in this Arbitrator's opinion to stretch the wording which is the Company's wording in its Prevention of Harassment Policy to cover the harassment of people not co-workers, subordinates or supervisors. In the company's testimony Mr. Deloughery at page 109 of the transcript was asked: "What was the reason for Mr. Campbell's discharge from the employment of the Company?" His answer was "Violation of the Company's

Business Conduct Policy, specifically dealing with harassment and discrimination." Question; Workplace harassment policy? Answer; Yes.

It would not, as stated above, in this Arbitrator's opinion be equitable to permit the Company to change the reason for Mr. Campbell's discharge at this late date. Based on the above, it is my finding that the Workplace Harassment Policy specifically is limited to harassment between an employee and other employees, whether subordinates or supervisors. It is my finding that the word "co-worker" means another employee of the Company. Therefore, the Company has failed to prove a violation of the Workplace Harassment Policy because Mr. Williams was not an employee of Tamko, but was instead an employee of Cummings Truck Lines. In other words, the Company chose the reason for the discharge of Mr. Campbell and so testified, and that basis for his discharge cannot now be changed or added to by alleging that his action toward Mr. Williams was a violation of public policy, federal law, or any other thing other than a violation of the Workplace Harassment Policy.

The language of Article V, Section 5, hereinabove set out under Applicable Contract Provisions, provides a limitation on the Arbitrator's authority and function to answering the following questions: (1) Whether the conduct or actions of the Grievant which led to the discharge or discipline did, in fact, occur, and, if so, (2) whether such conduct or actions by the Grievant justified disciplinary action by the Company. If the Arbitrator answers both of the foregoing questions in the affirmative, he shall deny the grievance and sustain the discharge or other discipline imposed by the Company. As I have stated above, the Company charged the Grievant with an offense that can only arise in harassment of a co-worker of the Grievant. Therefore, the answer to questions (1) and (2), above, are both in the negative.

AWARD

The grievance of Bobby Campbell is sustained and the Company is directed to compensate him for all lost wages and other benefits and without a break in his seniority with the Company. The Company is to return Mr. Campbell to the position he occupied prior to his termination and his. back pay will be calculated based on the number of straight time hours and overtime hours that the employee who replaced him actually worked from the time Mr. Campbell ceased working to the date of his reinstatement. From this figure there should be deducted any compensation or payments received by Mr. Campbell from the Alabama Unemployment Compensation bureau, plus any compensation earned by Mr. Campbell at any other jobs he may have worked during the period of time he has been out of Tamko's employ. The amount of the back pay is subject, of course, to the usual payroll deductions. Since there could be a dispute as to the amount of back pay owed to Mr. Campbell, I will retain jurisdiction of this matter for thirty (30) days and if either party notifies me in writing with copy to the other party that the parties cannot mutually agree as to the correct amount of back wages, I will set that question down for hearing and determination of the correct amount of back pay.

DATE OF AWARD;
September 10, 1998

/s/

J. Reese Johnston, Jr.
Arbitrator
800 Shades Creek Parkway
Suite 325
Birmingham, AL 35209

GRIEVANCE HEARING
ON BOBBY CAMPBELL
JULY 23, 1998

10:45 A.M.

WHEREUPON the following proceedings were taken before Nancy Pannell, Commissioner and Notary Public, State of Alabama at Large, at the Hampton Inn, Cottondale, Alabama on the 23rd of July 1998.

* * *

Mr. Campbell and you told Deloughery and White and Mitchell that there had been earlier times when Mr. Campbell had made, had called you names before, did Mr. Deloughery ask you specifically what Mr. Campbell had said to you?

A. Yes, he did.

Q. And when Mr. Deloughery asked that question how did you respond, what did you say?

A. Well, I told him it was names like porch monkey, biscuit lip.

Q. Porch monkey and what was the next one?

A. Biscuit lips, gig-a-boo.

Q. Gig-a-boo.

A. And I told them that I don't know why this started the way that it did. I also told them that the peoples at the office that I work for they was aware of what was going on over here.

Q. You mean the people you worked for at Cummings Truck Line?

* * *

you told them about these names that Mr. Campbell had called you in the past—biscuit lips and gig-a-boo and so on, did Mr. Deloughery ask you how recently Mr. Campbell had used those words in talking to you?

A. Well, I told them that it would happen often like once every week or twice a week or just nearly every week.

Q. Did Mr. Deloughery ask you how long ago?

A. Yes.

Q. And what did you say to him?

A. I told them that it started eight months after I had been over there the first year.

Q. You mean eight months after what?

A. Eight months after I took the job of spotter on the dock the year that I started over there. I been there for three years and it's been going on for two years and some months.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 00-15168-DD

TAMKO ROOFING PRODUCTS, INC.,
Plaintiff-
Counter-defendant-
Appellee.

versus

LOCAL 1071L UNITED STEELWORKERS OF AMERICA

Defendant-
Counter-claimant-
Appellant.

On Appeal from the United States District Court for the Northern District of Alabama

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September 4, 2001

ON PETITION(S) FOR REHEARING AND
PETITION(S) FOR REHEARING EN BANC

(Opinion_____, 11th Cir., 19__, ____ F.2d _____)

Before: CARNES and MARCUS, Circuit Judges, and PROPST*, District Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/
UNITED STATES CIRCUIT JUDGE

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[1] Honorable Robert P. Propst, U.S. District Judge for the Northern District of Alabama, sitting by designation.